

**DeJesus v City of Yonkers**

2019 NY Slip Op 34470(U)

October 28, 2019

Supreme Court, Westchester County

Docket Number: Index No. 50807/16

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 37

To commence the statutory time period for appeal as of right (RECEIVED NYSCEF: 11/04/2019)  
copy of this order, with notice of entry, upon all parties.

Disp   x   Dec        Seq. No.   1   Type   SJ  

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON  
-----X  
SAMUEL DEJESUS,

Plaintiff, Index No. 50807/16

-against-

DECISION AND ORDER

CITY OF YONKERS and YONKERS BOARD OF  
EDUCATION,

Defendants.  
-----X

The following papers numbered 1 to 3 were read on this

motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Memorandum of Law, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Affirmation in Reply	3

Defendants move for summary judgment dismissing the action in this personal injury case. The facts are undisputed. Plaintiff was playing football with friends and relatives in a field in Yonkers. Plaintiff testified at his deposition that he was very familiar with the field, and had played football and other sports many times over the years. Plaintiff also testified that he knew that there was a grate (presumably for drainage) in

the field. They deliberately set the boundaries for their game so that the grate was five to ten feet outside of the boundaries. Plaintiff testified that although he was well aware of the grate, "when you're running, looking up and stuff, you don't think to look down and notice anything." Plaintiff ran for the ball - out of bounds - and tripped, injuring himself. This action followed.

Defendants contend that they are not liable for plaintiff's injuries because of the doctrine of assumption of risk. As the Second Department has explained it, "if the risks of a sporting activity are fully comprehended or perfectly obvious to a voluntary participant, he or she has consented to them and the defendant has discharged its duty of care by making the conditions as safe as they appear to be. Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation. This includes risks associated with the construction of the playing surface and any open and obvious condition on it. If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be." *E. B. v. Camp Achim*, 156 A.D.3d 865, 866, 67 N.Y.S.3d 666, 667 (2d Dept. 2017). "Participants, however, are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably

enhanced.” *M.F. v. Jericho Union Free Sch. Dist.*, 172 A.D.3d 1056, 1057, 100 N.Y.S.3d 337, 340 (2d Dept. 2019). Here, there is no dispute that there was no reckless or intentional conduct of others. Nor was there any risk that was concealed or unreasonably enhanced. Although plaintiff argues in his opposition that the grate should have been painted orange, or put a cone on it, or something else to make it more visible, the visibility of the grate was not the issue. Plaintiff himself testified that he knew that the grate was there, but that he was not looking as he ran; an orange grate would not have made a difference. (Indeed, if there had been a cone there, plaintiff would have tripped on the cone.) See *Krzenski v. Southampton Union Free Sch. Dist.*, 173 A.D.3d 725, 726, 102 N.Y.S.3d 693, 695 (2d Dept. 2019) (“the proximity of the bleachers to the playing area was open and obvious, and the risk of collision with the bleachers was an inherent risk in playing indoor floor hockey in the subject gymnasium.”).

There is nothing that defendants could have done to avoid this accident. Plaintiff and his teammates, however, could have moved their boundaries further away from the grate - or someone could have warned plaintiff that he was going out of bounds, and

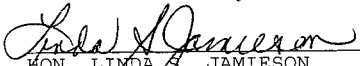
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RECEIVED NYSCEF: 11/04/2019

its entirety, and the action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
October 28, 2019

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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